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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-466

PETER J. BRENNAN, SECRETARY OF LABOR, *Petitioner,*

v.

WALTER BACHOWSKI, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the determination of the Secretary of Labor not to bring suit under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 to upset a challenged union election is beyond the scope of permissible judicial review even if such determination is arbitrary and capricious in that the Secretary's own investigation showed that violations of Title IV had affected the outcome of the election.

COUNTERSTATEMENT OF THE CASE

Respondent Walter Bachowski was a candidate for the office of District Director of District 20 of the United Steelworkers of America in an election held on

February 13, 1973 (App. 3A-4A). Running against the incumbent District Director (App. 4A), Respondent Bachowski had the full power of the "official family" of the Union against him,[1] as well as the large majority of the appointed staff men (App. 4A). Nevertheless, by the Steelworkers' own count, Respondent's defeat was by the narrow margin of 907 votes out of approximately 24,000 votes cast (App. 4A). After exhausting intra-union remedies before the very "official family" which had opposed his election (App. 4A), Respondent complained to the Secretary of Labor, June 21, 1973 (App. 4A), and attached a detailed STATEMENT IN SUPPORT OF CONTEST containing evidence of substantial wrongdoing in violation of the Steelworkers' constitution and of Title IV, LMRDA, which affected the election outcome.[2] The Secretary, without providing Respondent with any reason whatever, refused to bring suit to upset the election (App. 5A). After the present suit against the Secretary was filed, Respondent received a letter from the De-

[1] I. W. Abel, President of the Steelworkers, testified in another suit growing out of the February 13, 1973 election that the Union's "official family," consisting of the three International Officers and the District Directors, automatically supports the incumbents against any challenger with financial, legal and other assistance. *Brennan* v. *United Steelworkers of America and Edward Sadlowski*, Civil Action No. 73-0957-B (W.D.Pa.), deposition August 15, 1974, pp. 6, 7, 11, 12, 13, 15, 16. Thus, the incumbent in this case had the support of the Union's "official family" not only during the election campaign and the intra-union proceedings thereafter, but most importantly, for purposes of this case, *to persuade the Secretary not to bring suit*. And the intensity of the official family's feelings against any action whatever by the Secretary is illustrated by Mr. Abel's testimony that a union member who challenges an incumbent and loses should not appeal to the Government under LMRDA "even though there was ballot box stuffing" (Id. at pp. 37-38).

[2] Respondent has lodged this detailed STATEMENT IN SUPPORT OF CONTEST with the Clerk of this Court.

partment of Labor stating only that "civil action to set aside the challenged election is not warranted." See, *infra,* p. 1a.

On November 7, 1973, Respondent brought the present suit, naming the Secretary and the Union as defendants (App. 1A). Respondent alleged violation of the statute and the Union's Constitution as follows (App. 5A):

> "A. Section 401(A) of the Act, failed to elect by secret ballot in that many members were required or permitted to vote in such a manner that a member voting could be identified with the choice expressed.
>
> B. Section 401(C) of the Act, Union failed to provide adequate safeguards and denied the plaintiff the right to have observers at polling places and at the counting of the ballots.
>
> C. Section 401(E) of the Act, the Defendant Union violated its own Constitution, it denied members the right to vote without fear of reprisal, interference or penalty, and members were denied the right to vote in that elections were not conducted in at least one local.
>
> D. Section 401(G) in that the Defendant USWA used money received as dues and assessments to promote the candidacy of the plaintiff's opponent the incumbent Kay Kluz."

Respondent's verified Complaint goes on with this particularly significant allegation (App. 5A):

> "18. Notwithstanding the fact that the Defendant Secretary's investigation has substantiated the plaintiff's allegations and notwithstanding the fact that the irregularities charged affected the outcome of the election the Defendant Secretary refuses to file suit to set aside the election."

On the basis of the above allegations that the Secretary's own investigation showed violations of Title IV

which had affected the outcome of the election, Respondent sought a declaration that the Secretary's failure to file suit was "arbitrary and capricious" and an order directing him to file suit to set aside the election (App. 6A).

On November 9, 1973, the Secretary and the Union made an oral motion to dismiss the Complaint (App. 1A). On November 12, 1973, the District Court "determined that this Court lacks jurisdiction over the subject matter of this Complaint" and granted the motion to dismiss (Pet. for Cert. p. 21A). The Court concluded that it lacked "authority" to find that the Secretary's actions were arbitrary and capricious and to order him to file suit. See Doc. 9 at p. 27 (W.D.Pa., Civil No. 73-0954).

The Court of Appeals unanimously reversed, finding federal jurisdiction and concluding that the Secretary's determination not to bring suit is subject to judicial inquiry whether his action was arbitrary and capricious or an abuse of discretion. The Court below found no merit in the argument that the Secretary's "exclusive" post-election power to bring judicial challenge against election violations indicated a Congressional intent to make his inaction unreviewable; quoting this Court's analysis in *Trbovich* of the purposes behind that exclusivity, the Court of Appeals stated that "we do not believe that a limited judicial review of the Secretary's decision not to bring suit would in any way conflict with the purposes behind the Secretary's screening function" (Pet. for Cert. p. 9A). Nor did the Court of Appeals find any merit in the Secretary's contention that the 60-day time limit on the Secretary's suit indicated a Congressional intent to restrict judicial review; pointing to the repeated ex-

ceptions to the rule carved out by the Secretary, the Court below concluded that "a court would be acting consistently with the fundamental purpose of the L-MRDA in entertaining a suit beyond the time limit in those rare cases where the Secretary's original decision not to file suit has been successfully challenged" (Pet. for Cert. p. 11A). Finally, since "the Secretary acts not only for the benefit of the country as a whole, but also on behalf of those individuals whose rights have been infringed," the Court of Appeals rejected the Secretary's "prosecutorial-discretion" argument, and concluded that "To grant the Secretary absolute discretion in this situation seems particularly inappropriate, for if he wrongfully refuses to file suit, individual union members are left without a remedy" (Pet. for Cert. pp. 14A-15A).[3]

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[3] On remand and while the Secretary's petition for certiorari was pending, the Secretary of Labor filed with the District Court a self-serving statement of the reasons for his refusal to bring suit, a statement not even verified by his investigators or anyone else. The Government has printed this statement in its Brief (pp. 1a-16a) without informing the Court that the Department of Labor had refused Respondent's request to take the deposition of various Labor Department officials so the record could be adversary and complete. See, *infra*, pp. 2a, 3a. Any such deposition will show at least (i) that the Secretary's own investigation substantiated many of the charges in Respondent's STATEMENT IN SUPPORT OF CONTEST not covered in the Secretary's statement, (ii) that the Secretary in his statement withdrew votes from the incumbent without crediting them to Respondent in numbers far in excess of the remaining 23-vote margin on which the Secretary relies (Pet. Br. 14a), and (iii) that the Secretary in his statement repeatedly found local unions without adequate election safeguards but inexplicably limited the affected votes to the margin between the candidates. Apart from its erroneous and untested character, the Secretary's statement of reasons also has no conceivable purpose other than as an effort to obscure the statement of facts in the verified complaint which must, as a matter of law, be taken as correct inasmuch as the District Court held that it lacked jurisdiction.

SUMMARY OF ARGUMENT

The Secretary, in contending for absolute, unreviewable discretion not to bring suit to upset an election for any reason that may appeal to him,[4] is fighting an uphill battle. For, as this Court has repeatedly made clear (see, *infra*, p. 9), judicial review of arbitrary administrative conduct is the rule and exceptions are very narrowly restricted to instances of clear and convincing evidence that Congress intended the exception. Here the language, history and purpose of Title IV of LMRDA all reinforce rather than rebut the applicability of the general rule of judicial review.

Thus, the statute is drawn in mandatory terms; it places a positive duty on the Secretary to act. Further, Congress made clear in Title IV its intent to preserve private rights and remedies existing at the time LMRDA was adopted; it can hardly be presumed to have sacrificed those rights to the unreviewable whim of the Secretary. And possibly even more fundamental than the mandatory language and the protection of pre-LMRDA rights and remedies is the inconsistency between the claimed absolute discretion of the Secretary and the basic purpose of Title IV to promote union democracy. Thus, the general rule of judicial review is particularly applicable here, where the statute is in mandatory terms, where Congress recognized and sought to protect pre-existing private rights, and where the basic purpose of the statute comports with the principle of reviewability.

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[4] Counsel for the Secretary in the Court below, when asked whether the Government's claim of immunity from review included a case where a union made a substantial political contribution in return for the Secretary's decision not to sue, answered in the affirmative.

The arguments proffered by the Secretary for avoiding the general rule of judicial review, especially when considered in the light of the narrowness of the exception and the clear indications just recited of Congressional intent *favoring* review, are weak indeed. The "exclusive remedy" provision no more indicates an exception to the usual concepts of judicial review than it indicated an exception to the usual concept of intervention applied by this Court in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972). The Secretary's argument based on his "screening role" under Title IV merely restates the exclusivity argument and wholly fails to demonstrate that Congress intended to make the results of that screening unreviewable. As concerns the possibility of judicial review affecting settlements between the Secretary and the offending union, that question is simply not presented in this case; furthermore, there is no conceivable public interest in the Secretary being able to offer such settlements with the blessing of finality nor for an offending union to be entitled to expect a settlement on this basis. The "60-day provision" for suit by the Secretary has not barred the Secretary from later action in appropriate cases; surely, the Congressional desire that the Secretary initiate action promptly, supports rather than undermines judicial power to assure that he initiates action when he has arbitrarily failed to do so. Finally, the Secretary's strained analogy to prosecutorial discretion falls for this simple reason: a person aggrieved by exercise of prosecutorial discretion not to prosecute in the public interest retains a civil remedy of his own to correct whatever private harm he has suffered. Singly or in combination, none of these five contentions even comes close to building a case for an exception to the general rule of judicial review of

administrative action. It is small wonder, therefore, that this has been recognized by the predominant weight of authority and the unanimous decision below.

ARGUMENT

I

Judicial Review Is the Rule and Administrative Discretion Absolutely Immune From Review Is a Narrow Exception To Be Demonstrated by Clear Congressional Intent.

As the Secretary concedes—by way of grudging understatement—"ordinarily, final administrative decisions are judicially reviewable and may be set aside if arbitrary or capricious" (Pet. Br. p. 9). This is "ordinarily" the case because Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702, provides that a "person . . . affected or aggrieved by agency action . . . is entitled to judicial review thereof", and Section 10(e) of the APA, 5 U.S.C. 706 (which the Secretary does not even cite), directs in mandatory terms that where "agency action" is found to be "arbitrary, capricious [or] an abuse of discretion . . .", the reviewing court shall set it aside. 5 U.S.C. 706.[5]

After paying mere lip-service to the general reviewability of final administrative action, the Secretary leaps to the APA exceptions where "statutes preclude judicial review," 5 U.S.C. 701(a)(1), and where

[5] Actually, APA restates the rule which had been developed by this Court in the absence of statute. See *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 536 (1946); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612 (1946); Schwartz and Wade, *Legal Control of Government, Administrative Law in Britain and the United States*, Clarendon Press Oxford (1972) ("It has always been basic in American public law that officers vested with discretion possess only the authority to exercise such discretion reasonably. If the discretion is abused, the courts will intervene." p. 262).

"agency action is committed to agency discretion by law," 5 U.S.C. 701(a)(2); he contends that since suit brought by him is the "exclusive remedy" by which a union election may now be challenged, his decision whether or not to bring such a suit is committed to his unreviewable discretion (Pet. Br. p. 9). But in claiming immunity from judicial review, the Secretary struggles in the face of the long line of decisions which stress and restress that even in discretionary areas judicial review is the rule, that exceptions must be demonstrated by evidence of clear Congressional intent, and that the burden of a party claiming an exception is heavy. *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971) ("This is a very narrow exception. . . . [I]t is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410); *Barlow* v. *Collins*, 397 U.S. 159 (1970) (Judicial review is to be held restricted "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." 397 U.S. at 167). See also L. Jaffe, *Judicial Control of Administrative Action* 346 (1965); 4 K. Davis, Administrative Law Treatise § 28.07 (1958). As the Court stated in *Barlow*:

> ". . . [j]udicial review of . . . administrative action is the rule, and nonreviewability an exception which must be demonstrated." 397 U.S. at 166.

Here, as we next show, all considerations demonstrate that it is the rule which applies, not the exception.

II

The Language, History and Purpose of Title IV of LMRDA Reinforce Rather Than Rebut the Applicability Here of the General Rule of Judicial Review.

Title IV of LMRDA is drawn in mandatory terms; it places a positive duty on the Secretary to act. Section 402(b) provides that the Secretary "*shall* investigate" election complaints and, upon finding of probable cause, he "*shall* . . . bring a civil action. . . ." (Emphasis added).[6] It is precisely this mandatory duty to act to which the Secretary has been faithless, refusing to bring suit even though his own investigation showed that Title IV violations had affected the outcome of the election.

Not only is Section 402(b) couched in mandatory terms, but the mandatory nature of the Secretary's duty where an election was tainted is further evidenced by the clearly expressed Congressional intention to preserve private rights and remedies existing at the time LMRDA was adopted. Thus, Section 403, 29 U.S.C. 483, provides that "Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive." It imputes irrationality to Congress to suggest that it preserved pre-LMRDA rights of private suit up to the point of an election, but that after the election it desired, without saying so, to sacrifice them to the unreviewable whim of the Secretary.

[6] The word "shall" in Title IV draws added strength from Congress' use of the word "may" in the civil enforcement section of Title II. See Section 210, 29 U.S.C. 440.

As the Government concedes (Pet. Br. p. 12), prior to enactment of LMRDA a defeated candidate for union office had recourse to state courts for election violations of the union constitution or by-laws. Yet the Government is now arguing that Congress intended to give the Secretary absolute discretion to decline to file suit even where a violation of the union constitution or by-laws clearly affected the outcome of the election. The Secretary's construction would not only have LMRDA cut off the post-election remedy for the member which he had in the courts before its enactment; it would impute to Congress the intent to bar judicial recourse to the member even where the Secretary arbitrarily refuses to vindicate his rights under the union's constitution infringed in the union election. It is hard to believe that in one sentence of Section 403—"with respect to elections prior to the conduct thereof"—Congress expressly protected pre-existing private rights of action, yet intended by the very next sentence *without saying so* that after the election there be no judicial recourse at all when the Secretary arbitrarily refuses to initiate the action which the statute says he "shall" bring in given circumstances.[7]

There being no legislative intimation of so severe a result, application of the general rule permitting review where discretion has been abused better comports with the Congressional intent where, as here, Congress has entrusted the Secretary not only with the vindication of the public rights created by the statute but also the pre-existing private rights of members

[7] In addition to the language in Section 403 quoted in the text, Senator Kennedy, the bill's floor manager, made clear in a colloquy with Senator Wiley that the new law was intended to protect existing rights. 104 Cong. Rec. 10947 (1958).

under union constitutions. Where private rights were at stake in suits instituted by federal labor relations agencies, this Court inferred that Congress did not desire to close the judicial door to those private parties. Precisely because their rights were affected, this Court ruled in *International Union, UAW* v. *Scofield,* 382 U.S. 205 (1965), that the private parties in interest could intervene in the public proceedings; it ruled to like effect in *Trbovich* where the Secretary argued that his authority to sue pre-empted all judicial rights of individual union candidates or members.

If that was the proper construction where the agencies were vindicating only federally-created statutory rights, it is all the more the correct construction here, where Congress has also made the Secretary the trustee of private rights under union constitutions by delegating to him their vindication. The duties of a trustee are among the most rigorously enforced in our legal tradition. Far from nonreviewability, courts have traditionally exercised the greatest scrutiny to assure that beneficiaries' interests have been fairly and fully preserved by the trustee. There is thus a "distinctive obligation of trust incumbent on the Government" toward those dependent on its care of their interests. *Seminole Nation* v. *United States,* 316 U.S. 286, 296 (1942). See also, *Squire* v. *Capoeman,* 351 U.S. 1, 8 (1956). Accordingly, judicial review of the federal agency's exercise of discretion is available to assure protection of the private interests entrusted to its care. See, e.g., *United States* v. *Arenas,* 158 F. 2d 730, 749, 752 (C.A. 9, 1946) *cert. den.* 331 U.S. 842.[8]

[8] An interesting analogy is found in *Honda* v. *Clark,* 386 U.S. 484 (1967). There this Court tolled limitations against the Government's claim of sovereign immunity and its assertion of a specific statute of limitations. It found that course "much more consistent with the overall congressional purpose," and one "nowhere eschewed by Congress, to preserve petitioners' cause of action" (p. 501). In reaching that result this Court noted that the limitations period was designed for the benefit of claimants, and "not primarily as a shield for the Government" (p. 496). The Government, the Court emphasized, had no real interest in the fund itself, but was "a mere stakeholder, a custodian in the true sense of the word" (p. 498). Thus, to safeguard the interests of claimants for whom the statute —including its limitations period—was adopted, this Court refused to heed the Government's claim of immunity from suit. So, too, in the present case it is for the benefit of union members that Congress enacted Title IV, and the result more consistent with Congressional intent is to afford them judicial review where their interests have been impaired by the Government's arbitrary refusal to act.

In view of these established principles, only the clearest legislative expression could require the conclusion that in Title IV Congress not only entrusted vindication of private rights to the Secretary's authority to commence judicial enforcement, but also desired to preclude normal judicial review where he has arbitrarily failed to do so.

Possibly even more fundamental than the mandatory language and the protection of pre-LMRDA private rights is the inconsistency between the claimed absolute discretion of the Secretary and the basic purpose of Title IV. There can be no question that "Congress saw the principle of union democracy as one of the most important safeguards" against the abuse of union power. *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 531 (1972). To insure such union democracy, Congress established in LMRDA a comprehensive scheme for the regulation of union elections. It would hardly seem credible for Congress, recognizing the importance of union democracy, to permit

nullification of its basic purpose through arbitrary inaction by the Secretary. We deem it unnecessary to burden the Court with a repetition of the able presentation by the attorneys for the Association for Union Democracy in their *amicus* brief, which demonstrates beyond serious challenge that the arbitrary power claimed by the Secretary is inconsistent with the history and purpose of the statute.

It seems clear, therefore, that the general rule of judicial review is particularly applicable in the circumstance of this case where the statute is in mandatory terms, where Congress recognized and sought to protect pre-existing private rights, and where the basic purpose of the statute comports with the principle of reviewability. We turn now to demonstrate the unpersuasiveness of the Government's efforts to construct a Congressional intention to the contrary.[9]

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[9] The Steelworkers (but not the Secretary of Labor) assert that the result espoused by the Court below violates Constitutional principles of separation of powers (pp. 9-12). But surely their argument is strained and unpersuasive. The criminal prosecution precedents which they cite are hardly apposite when the issue is the Secretary's failure to question the validity of a labor union election by the process which Congress has mandated. Indeed, a *more* serious Constitutional issue would arise were this Court to reject judicial authority, because here Congress entrusted the power to invoke judicial process to the Secretary not only for redress of public rights but also redress of the contract right of the member under his union constitution. A serious Constitutional issue would arise from the construction that Congress made the Secretary's action completely unreviewable after having relegated the union members' private rights of legal redress to the Secretary's care. We know of no situation where Congress has gone so far, and respectfully submit that so harsh a conclusion would itself present questions of due process and transgress the limits of Congressional power to preclude vindication of union members' common law and contract rights.

III

None of the Secretary's Contentions Afford any Basis for Avoiding the General Rule of Judicial Review of Arbitrary Administrative Action.

1. *The "Exclusive Remedy" Provision of Section 403, 29 U.S.C. 483, Does not Indicate any Exception to the Usual Concepts of Judicial Review.*

As indication that Congress intended to immunize from judicial review his decision not to bring suit under Title IV of LMRDA, the Secretary points primarily to the provision in Section 403, 29 U.S.C. 483, that suit by the Secretary is the "exclusive remedy" for challenge of a union election.[10] If the contention has a familiar ring, it is because it is the same contention which the Secretary placed before this Court in *Trbovich*. There the Secretary argued that the "exclusive remedy" provision of Section 403 barred a union member from intervening pursuant to Rule 24(a), Federal Rules of Civil Procedure, in Title IV litigation initiated by the Secretary. But this Court recognized in *Trbovich* that the exclusivity provision of Section 403 is addressed to *initiation* of suit and not to *intervention,* and refused the Secretary's plea

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[10] Reiterated as a chorus through the Secretary's brief (pp. 6, 8, 18, 25) are variations on the catch phrase that Respondent "seeks to achieve by indirection what he cannot do directly—to bring a suit at his own behest against a labor organization to set aside an election of officers." This Court surely knows a straw man when it sees one. Respondent obviously does *not* seek to bring suit at his own behest, but merely to assure that the Secretary perform his duty according to Title IV without abuse of discretion or arbitrary and capricious action. Access to judicial review of arbitrary agency action is by no means the equivalent of a direct right to sue to upset a union election, for the plaintiff's burden is far greater where he must demonstrate the arbitrariness of agency conduct.

to hold that exclusivity of suit somehow established an exception to the normal concept of intervention. Now the argument is recast to the effect that the same exclusivity provision somehow indicates an exception to normal concepts of judicial review. But here, as in *Trbovich,* the answer is that Section 403 merely says that the Secretary is the sole party who can *initiate* suit under Title IV.[11] It no more suggests that the Secretary can exercise his power in this respect arbitrarily and capriciously with immunity from review than it bars intervention. Congress was obviously aware of APA when it enacted Title IV, just as it was obviously aware of Rule 24, F.R.C.P. Surely, if Congress intended a scheme which would avoid normal APA judicial review procedures, it would have said so clearly rather than merely providing that the Title IV remedy involving suit by the Secretary was to be exclusive. Indeed, the exclusivity of the Secretary's power to redress both public and private rights, by initiating suit after a union election, argues more logically *for* the inference that Congress desired the safeguard of normal judicial review than it does for an inference that it added unreviewability to exclusivity.

[11] If anything, the claimed immunity from review is even more difficult to swallow than the claimed ban on intervention proffered to this Court by the Government in *Trbovich*. The claim of nonreviewability necessarily involves the arrogant assertion of an administrative right to act arbitrarily and capriciously, wholly without judicial check. This would leave aggrieved Title IV complainants without any remedy whatsoever, even worse off than they would be without the right of intervention in court. This is so because even without intervention—assuming the Secretary was proceeding according to law without abuse of discretion—the Title IV complainant would still have a remedy through the Secretary's prosecution of his complaint.

2. *The Secretary's "Screening Role" Under Title IV Does not Establish Immunity From Review.*

The Secretary devotes a separate Section of his brief —which purports to be a separate argument—to the proposition that judicial review would be contrary to the Title IV "screening mechanism" (Pet. Br. pp. 18-25). But the screening mechanism is simply part and parcel of the exclusivity power. Surely, as the Court said in *Trbovich,* Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons:

> "(1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election." *Trbovich, supra,* 404 U.S. at 532.

Obviously, both justifications for exclusivity involve the administrative screening mechanism; so put the argument against judicial review in terms of the screening mechanism does no more than restate the argument against review in terms of the exclusivity of the Title IV remedy. Concededly, Congress intended that the Secretary would perform a screening mechanism; but the question here is whether it also meant that such a mechanism should go wholly untended and without check even where working so outrageously as to screen out cases of clear merit. Nothing in Title IV, its legislative history, or this Court's decisions indicates such an odd result.[12]

[12] The Secretary stresses the aspect of the Court's holding in *Trbovich* that the intervenor would not be allowed to assert new bases for upsetting the election not found by the Secretary to have been meritorious (Pet. Br. p. 18). From this the Secretary argues that the Court somehow meant to imply that his decision not to

Nor is the limited judicial review contemplated by the Court of Appeals decision inconsistent in practical terms with the purposes of the Title IV screening function. As the Court of Appeals observed, unions would not be exposed to undue judicial interference with their elections since, under the "arbitrary and capricious" standard of review, the Secretary's decision not to bring suit would be overturned only upon clear evidence that he had ignored a meritorious complaint. At any rate, the primary burden of defending the litigation would be on the Secretary of Labor. And in those instances where challenge to the Secretary's decision not to bring suit was successful, the ensuing litigation would still be centralized in a single proceeding.[13] Thus the Secretary's screening role is in no way inconsistent with the general rule of judicial review.

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prosecute such claims was immune from review. But, as pointed out by the Court of Appeals (Pet. for Cert. p. 9A, n. 7), the issue of reviewability was *not* presented in *Trbovich*. The Court's decision that the intervenor could not circumvent the screening mechanism by raising new issues which the Secretary had already rejected presupposes a proper working of the screening mechanism in which no showing had been made or attempted that the Secretary's rejection of the claims was arbitrary, or constituted an abuse of discretion. As recognized by the Steelworkers' brief (p. 4), petitioner in *Trbovich* was critical of the Secretary's failure to include certain elements in his suit; however, petitioner Trbovich focused his efforts on intervention. Unlike Bachowski, Trbovich never sought to challenge the Secretary's decision on grounds of arbitrariness or abuse of discretion.

[13] The Secretary's dread hypothesis (Pet. Br. p. 22) of a multiplicity of suits, possibly in different courts, challenging the Secretary's decision not to sue to upset a particular election is as unpersuasive as it is lacking in even a single factual precedent over the 16 years of LMRDA. But if this ever should happen, such suits could be consolidated and the eventual suit by the Secretary could be part of the same ongoing proceeding, thereby avoiding duplication of judicial effort.

3. The Assertion That Judicial Review Might Preclude Settlements Between the Secretary and the Offending Union Does Not Support Absolute Discretion in the Secretary.

The Secretary points to nothing in Title IV or any decided case which indicates that the settlement process is so salutary that any checks upon it must be avoided.[14] Here, as throughout his brief, the Secretary incredibly places a higher premium on minimizing interference in internal union affairs than on actively seeking to assure democratic union elections and protecting the rights of individual union members, which after all are the principal goals of the legislation. Even if the Secretary may have greater "success in efforts to settle . . . cases" (Pet. Br. p. 23) if he can assure the settlement will have absolute finality, the interests which Title IV sought to protect are necessarily frustrated in any case where the Secretary's action in settling the complaint without suit was so outrageous as demonstrably to be arbitrary and capricious. There is no conceivable public interest in the Secretary being able to offer such settlements with the assurance of finality, nor for an offending union to be entitled to expect a settlement on this basis.

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[14] The Secretary cites *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964) and *Wirtz* v. *Local 153, Glass Bottle Blowers Assn.*, 389 U.S. 463 (1968) in support of the proposition that Congress meant to avoid undue intrusions into union affairs; but neither case in any way supports the Secretary's assertion of the sanctity of the process by which he settles some Title IV complaints short of suit. Indeed, the half-hearted LMRDA enforcement over the years (*Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407 (1972); *amicus* brief for the United Mine Workers) leaves little doubt that some check on such settlements would be highly desirable.

In any event, the reviewability of settlements entered into by the Secretary is simply not presented in this case, and its pre-judgment here as a basis for resolution of the question which *is* pending would be quite inappropriate. The Secretary's fears for his powers of settlement recall the identical fears expressed by the Labor Board in *International Union, UAW* v. *Scofield*, 382 U.S. 205 (1965). This Court (at p. 222, n. 19) refused to anticipate the settlement issue as a basis for resolving the intervention question. Here, too, it will suffice for the Court to resolve the question pending, which has nothing to do with settlements but only with an absolute and arbitrary refusal by the Secretary to take any remedial action whatever.

4. *The "60-day Provision" does not Establish Immunity From Review.*

The Secretary's contention that review would violate Title IV because it would involve initiation of some suits after the 60-day period allowed by Section 402 is as hollow as his exclusivity, screening and settlement contentions. Suit after 60 days, it is said, would undercut the legislative policies of minimizing intrusion into union affairs and resolving as quickly as possible any cloud upon the office holder. Again, the Secretary seeks to obscure the principal legislative aim of Title IV which was not to minimize intrusion or remove clouds but to further the cause of union democracy. The Secretary concedes, as he must, that suit may be brought after the 60-day period where he has obtained the union's consent to extension of the 60-day period, *Hodgson* v. *Local 851, IAM*, 454 F. 2d 545 (C.A. 7, 1971); *Hodgson* v. *International Printing Press & Assist. Union*, 440 F. 2d 1113 (C.A. 6, 1971), *cert. denied*, 404 U.S. 828, and where the Union has obstructed the Secretary's investigation, *Wirtz* v. *Local Union 1622*, 285 F. Supp. 455 (N.D. Calif., 1968); *Wirtz* v. *Independent Workers Union*, 65 LRRM 2104 (M.D. Fla., 1967). These decisions indicate that the 60-day limitation will yield in the face of overriding legislative aims. Clearly the need to assure that there will be an effective remedy is such an aim. As recognized by the Court of Appeals, the concern for speedy resolutions evinced by the 60-day limitation "may be subordinated to the goal of providing an effective remedy for election irregularities" (Pet. for Cert. p. 11 A). Put another way, the issue here is not whether the Secretary will act within 60 days, but whether he will act *at all*. Surely, the Congressional desire that the Secretary initiate action promptly, supports rather than undermines judicial power to assure that he initiates action when he has arbitrarily failed to do so.

5. *The Secretary's Decision under Title IV Is Not Immune from Review as an Exercise of Prosecutorial Discretion.*

The Secretary's attempt to analogize his decision not to sue under Title IV to an exercise of prosecutorial discretion not to prosecute falls for this simple reason: a person aggrieved by exercise of prosecutorial discretion not to prosecute in the public interest retains a civil remedy of his own to correct whatever private harm he has suffered. This point was succinctly put by the Court in *Schonfeld* v. *Wirtz*, 258 F.Supp. 705 (S.D. N.Y. 1966); in rejecting the analogy to prosecutorial discretion in a suit on all fours with this one, the Court stated:

> "If this court may not review [the Secretary's] decision, plaintiff is left without a remedy. This fact distinguishes the present case from cases holding that the decision of a prosecutor not to prosecute may not be reviewed." 258 F. Supp. at 708.

This same point is also the answer to the Secretary's heavy reliance on the NLRA analogy. There Congress created wholly new federal statutory rights which it relegated to the enforcement powers of the Labor Board's General Counsel by the issuance of a Board complaint. Here, however, Congress has vested in the Secretary the power to initiate judicial action after an election not only for redress of rights created by the LMRDA, but also private rights under the union constitution which were violated in the election. To find Congressional intent that exclusively statutory rights be redressed through unreviewable prosecuting authority is one thing. It is quite another to infer that Congress intended unreviewability where private rights have also been entrusted to the litigating authority of a federal agency.

Moreover, Congress directed that where the Secretary finds probable cause to believe that a violation occurred which may have affected the election outcome, he *shall* bring suit seeking to set the election aside. 29 U.S.C. 482; *Howard* v. *Hodgson*, 490 F. 2d 1194, 1197 (C.A. 8, 1974). This additionally distinguishes the Title IV scheme from that embodied in the National Labor Relations Act and other statutes to which the Secretary refers.[15]

[15] While there are some similarities between the NLRA enforcement scheme and that embodied in Title IV, LMRDA, there are also marked differences in the procedures followed by the respective enforcement agencies which weigh heavily in favor of reviewability of the Secretary's decision not to bring suit. In contrast to the procedure followed by the Secretary, that of the NLRB is replete with internal procedural safeguards to prevent arbitrary treatment of those who seek the agency's help. When an NLRB regional office decides against issuing a complaint, the charging party is routinely notified of the reasons—which as a practical matter he has the opportunity to rebut—and given the right of administrative appeal, which involves opportunities for presentation of briefs and oral argument. See Testimony of former NLRB General Counsel Stewart Rothman to Senate Labor Subcommittee, Subcommittee on the NLRB, Committee Print, 87th Cong. 1st Sess. (1960), pp. 31-47. Contrast what happens in the Department of Labor where there is no right of appeal and where reasons for the decision not to issue a complaint are routinely not given, as indicated by the treatment received by Respondent in this case. App. 5A; *infra*, p. 1a. The total lack of internal safeguards against arbitrary action by the Secretary weighs heavily on the side of review.

Moreover, the Secretary's reliance upon decisions such as *Vaca* v. *Sipes*, 386 U.S. 171 (1967) is equally misplaced. *Vaca*, for example, involved a breach of the duty of fair representation which the victim can litigate in federal or state court as well as complain of in an unfair labor practice charge. In such an instance, nonreviewability of the General Counsel's decision does not leave the victim without a remedy. It is to a large extent because of the nonreviewability of the NLRB General Counsel's decisions not to pursue unfair labor practice charges that the courts have taken an increasingly broad view of the matters which are subject to the concurrent jurisdiction of the NLRB and the courts. *Smith* v. *Local 25, Sheet Metal Workers Int. Assn.*, 500 F. 2d 741, 745, n. 2 (C.A. 5, 1974). Here, in contrast, since the statute makes suit by the Secretary the *exclusive* remedy and there is no independent avenue of judicial relief, the availability of some judicial recourse is essential to preserve not merely statutory

rights but also private rights under union constitutions. Thus here a statutory construction in favor of limited judicial recourse in no way impairs the continued unrestricted discretion of federal prosecutors charged only with the enforcement of public rights.[16]

6. *The Weight of Authority Recognizes That Review of the Secretary's Decision not to Bring Suit is Consistent with Title IV.*

Contrary to the assertions of the Secretary, the overwhelming weight of authority bearing upon the question presented in this case rests firmly on the side of the Court of Appeals' view that

> "judicial review would further the general policy of Title IV of the L-MRDA by ensuring that the Secretary does not deny a remedy to those whose rights Congress sought to protect." Pet. for Cert. p. 10A.

First, as already indicated (see *supra,* p. 10), the statute is plain in defining the duty which the Secretary owes to a complaining union member as one which is *mandatory;* the statute provides that, where probable cause exists, the Secretary "shall . . . bring a civil action. . . ." 29 U.S.C. 482. As recognized in *DeVito* v. *Shultz,* 300 F. Supp. 381 (D.D.C. 1969)—one of the two decisions preceding the decision of the Court of Appeals in this case which extensively considered the question posed here—the courts are not lacking in pow-

[16] The Secretary's attempted distinction (p. 9, n. 3) of *Adams* v. *Richardson,* 480 F.2d 1159 (C.A.D.C., 1973) as merely a case of judicial review of a total administrative renunciation of enforcement of the statute misstates the case. The *Adams* order, upheld by the Court of Appeals, directed commencement of formal enforcement proceedings in some 201 individual school districts and 10 state systems of higher education.

er "if it should clearly appear that the Secretary has acted in an arbitrary and capricious manner by ignoring the *mandatory duty* . . . under the powers granted by the Congress." 300 F. Supp. at 382. (Emphasis added.)

The argument that immunity from review is evinced by the exclusivity provision was considered by Judge Gesell in *DeVito, supra,* and rejected. Judge Gesell reasoned as follows:

> "Indeed the very exclusivity of the remedy serves to emphasize the necessity of some degree of Court supervision. To rule otherwise would enable the Secretary to frustrate the will of Congress; it would leave the Secretary's conduct immune from scrutiny in matters where he is charged with significant responsibilities that must be carried out if the sweeping congressional directive to infuse basic principles of democratic free election into union organizations is to be implemented." *DeVito, supra,* 300 F. Supp. at 382.

Accordingly, the Court in *DeVito* held the Title IV complainant entitled to demand that the Secretary exercise his authority according to law and not arbitrarily or capriciously, and required the Secretary to furnish a reasoned statement of the basis for his decision so as to give the Court a basis for determining whether the Secretary's decision was consistent with the law.[17]

[17] The Secretary indicates he has no disagreement with the portion of the Court of Appeals' decision requiring him to furnish the complainant with a statement of reasons for not filing an action (Pet. Br. p. 5, n. 2) and thus that his contrary practice over sixteen years and in this case has been unlawful. This concession is somewhat surprising since the sole function of eliciting a statement of reasons is to establish a basis for judicial review, which the Secretary still persists in contending is precluded by Title IV. We

Similarly, *Schonfeld* v. *Wirtz,* 258 F. Supp. 705 (S.D.N.Y. 1966)—the other previous decision extensively considering the question posed here—rejected the Secretary's assertion of immunity from review on his decision not to sue. That Court too viewed the exclusivity provision of Title IV as weighing on the side of review, reasoning that "[i]f this court may not review that decision, plaintiff is left without a remedy." 258 F. Supp. at 708. The *Schonfeld* Court recognized that immunity from review is a narrow exception which must be positively indicated and simply found "nothing in [LMRDA] to indicate that the Secretary has 'absolute discretion' or that decision is 'totally committed' to his judgment. . . ." 258 F. Supp. 708.

The Secretary's characterization of other decisions involving the reviewability question is simply not candid. For example, the Secretary unabashedly claims that in *Howard* v. *Hodgson,* 490 F. 2d 1194 (C.A. 8, 1974), the Eighth Circuit "concluded that . . . [the Secretary] has unreviewable authority to decide which claims are deserving of prosecution" (Pet. Br. p. 25, n. 11), despite the Eighth Circuit's specific disavowal of any such conclusion. The Eighth Circuit stated: "This is *not* to say that the Secretary's discretion under § 482 is absolute." 490 F. 2d at 1197. (Emphasis added). Indeed, the Eighth Circuit held, contrary to the District Court, that federal jurisdiction was properly invoked, and affirmed the dismissal of the complaint only after holding that the Secretary's action was not contrary to law inasmuch as the Secretary's

find it difficult to discern a Congressional intent to require the Secretary to give his reasons for inaction while making unreviewable reasons once given.

investigation had disclosed merely a simple, technical violation which the Secretary had properly concluded had not affected the election outcome.

Also miscited by the Secretary is the Ninth Circuit's decision in *Brennan* v. *Silvergate District Lodge No. 50,* 503 F. 2d 800 (C.A. 9, 1974), a case involving not the question of reviewability under APA but the right of an incumbent union officer to intervene in defense of Title IV litigation. And the Secretary wholly ignores statements of the Seventh Circuit in *Hodgson* v. *Local 851, IAM,* 454 F. 2d 545 (C.A. 7, 1971) expressing specific agreement with the holdings of *DeVito* and *Schonfeld* that the Secretary's decisions "can be challenged if they constitute an abuse of discretion . . ." 454 F. 2d at 552. Thus, contrary to the Secretary, both of the other Courts of Appeals which have addressed the reviewability question—the Seventh and Eighth Circuits—have indicated agreement with the Third Circuit.

Nor is it at all clear that the District Court decisions cited by the Secretary genuinely support his claim of immunity from review. As observed by Judge Gesell in *DeVito,* such decisions as *Katrinic* v. *Wirtz,* 62 LRRM 2557 (D.D.C., 1966), and *Altman* v. *Wirtz,* 56 LRRM 2651 (D.D.C. 1964), involving dismissals of attempts to challenge the Secretary's decision, "do not in any way indicate that the Court did not make sufficient inquiry to be satisfied that the Secretary was properly complying with his responsibilities." 300 F. Supp. at 384, n. 2. Perhaps most unpersuasive is the Secretary's suggestion that *DeVito* somehow involves a "middle ground" (Pet. Br. pp. 25-26, n. 11) since the Secretary was ordered to give a statement of his reasons for refusing to bring suit, but thereafter

the complaint was dismissed. The *DeVito* opinion, as indicated above, makes abundantly clear that the Secretary's decision could be set aside if found by the Court to constitute an abuse of discretion. And *Ravascheri* v. *Shultz*, 75 LRRM 2272 (S.D.N.Y. 1970), also cited by the Secretary for the proposition of nonreviewability, indicates its accord with *Schonfeld* and ultimately held only that the Secretary had properly exercised his discretion in the particular case.

To the extent that courts have been reluctant, as a practical matter, to become involved in reviewing the Secretary's decisions not to bring suit, such reluctance has been criticized in scholarly analyses as being inconsistent with the remedial purposes of Title IV and out of step with expanding notions of APA judicial review generally. *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407 (1972) [18]; Estreicher, *Pre-Election Remedies Under the Landrum-Griffin Act: The "Twilight Zone" Between Election Rights Under Title IV and the Guarantees of Titles I and V*, 74 Colum. L.Rev. 1105, 1117 (1974). And it is significant that while the Secretary invariably contends, whenever his decision not to bring suit is challenged, that immunity from review is to be inferred from the exclusivity provision, no court has ever actually adopted that position. This Court, too, should refrain from engrafting an unreviewability provision onto Title IV, leaving Congress free to

[18] "Judicial reluctance to compel § 402 suits overlooks the fact that the individual complainant can vindicate his Title IV rights only through suit by the Secretary. A determination by the Department not to sue is effectively a final judgment on the merits. Moreover, in other areas, courts are beginning to exercise judicial review when the abstention of an agency has such an effect of finality." 81 Yale L.J. at 501.

achieve that result by clear statutory language should the Department of Labor persuade the legislature in favor of so drastic an exception to the usual principle.

CONCLUSION

Although Congress well knows how to make administrative action unreviewable, in Title IV of LMRDA it employed mandatory terminology and nowhere indicated that the general rule of reviewability was to be abrogated. In such instances, if there is *any* substantial policy reason which favors judicial review, it seems clear that this Court should not presume a Congressional intent to preclude it. And here we have shown that there are not only substantial policy reasons favoring review, but that on balance they are far more weighty than the policies which the Secretary advances. Under such circumstances, Congress not having abrogated the reviewability principle or intimated any desire to do so, it is surely the rule of reviewability which should apply, rather than the narrow exception.

Certainly it is hoped that in the majority of cases the Secretary will perform his duties and that his decisions not to bring suit under Title IV will be well based. But where that is not the case, the courts must step in. In litigation involving the Federal Communications Commission, Chief Justice Burger once referred to the theory that the FCC represents the interests of the public as "one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear . . . that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it." *Office of Commun-*

ication v. *Federal Communications Commission,* 359 F. 2d 994, 1003-4 (C.A.D.C., 1966). The Secretary of Labor is certainly no more infallible than the FCC, or the other federal agencies whose arbitrary actions are now clearly subject to judicial safeguards under federal statutes as implemented by this Court's rulings. Congress has rightly perceived that unreviewability yields to agencies an absolute power which is likely to corrupt. Where Congress has not specified its intent to apply that dangerous exception to the rule of judicial review, there is no basis for abrogation of judicial safeguards.

For the reasons stated herein, the decision of the Court of Appeals should be affirmed.

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Attorneys for Respondent

APPENDIX

APPENDIX

U.S. DEPARTMENT OF LABOR
LABOR-MANAGEMENT SERVICES ADMINISTRATION
Office of Labor-Management and Welfare Pension Reports
Washington, D.C. 20216

Nov. 7, 1973

Mr. Walter Bachowski
8 Cross Street
Pittsburgh, Pennsylvania 15205

Dear Mr. Bachowski:

This is to notify you of the disposition of your complaint to the Secretary of Labor alleging that violations of Section 401 of the Labor-Management Reporting and Disclosure Act of 1959, as Amended (LMRDA), had occurred in the election of District Director conducted by District 20, United Steelworkers of America, AFL-CIO, Baden, Pennsylvania, on February 13, 1973.

Pursuant to Sections 402 and 601 of the Act, an investigation was conducted by this Office. Based on the investigative findings, it has been determined, after consultation with the Solicitor of Labor, that civil action to set aside the challenged election is not warranted. We are, therefore, closing our file in this case as of this date.

Sincerely yours,

/s/ JOHN V. MORAN
John V. Moran
Acting Director

KENNETH J. YABLONSKI
ATTORNEY AT LAW
505 WASHINGTON TRUST BUILDING
WASHINGTON, PENNSYLVANIA 15301

December 17, 1974

STEPHEN ERNST, ESQUIRE
Department of Labor
3535 Market Street
Philadelphia, Pennsylvania 19104

RE: Peter J. Brennan, Secretary of Labor
United States Department of Labor v.
United States Steelworkers of America
AFL-CIO-CLC (District 31)
Edward Sadlowski, Intervenor

Dear Mr. Ernst:

We received the reply of Secretary Brennan and after having reviewed it, we feel that it is totally inadequate. It is our desire to take the deposition of various persons from the Labor Department in an effort to properly place before the Court all of the facts involved. We realize, of course, that when the Secretary filed his reply, it was stated that in doing so he was not waiving any rights he might have concerning the Petition for Certiorari which was pending in the Supreme Court at the time. Since certiorari has been granted, I would appreciate your advising me whether or not you will agree to permit us to proceed with the depositions we intend or will you raise the pendency of this action in the Supreme Court as a bar. I think you will agree that it is better to have an understanding at this time rather than for me to proceed with filing notices of depositions and then you, if you intend to, file an objection.

I would appreciate hearing from you regarding this at your earliest convenience.

Very truly yours,

KENNETH J. YABLONSKI

CC: James English, Esquire
Joseph L. Rauh, Esquire

U.S. DEPARTMENT OF LABOR
OFFICE OF THE REGIONAL SOLICITOR
3535 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19104
215-597-1126

December 24, 1974

Kenneth J. Yablonski, Esquire
505 Washington Trust Building
Washington, Pennsylvania 15301

Re: Walter Bachowski v. Peter J. Brennan, et al.
USCA 3rd Cir., No. 73-2029

Dear Mr. Yablonski:

We are in receipt of your letter of December 17, 1974 wherein you indicate your desire to take the depositions of certain personnel of the U.S. Department of Labor.

Please be advised that in light of the pendency of the appeal in this matter before the U.S. Supreme Court, we do not believe that the taking of such depositions would be procedurally correct. As you are aware, the Secretary's filing of a statement of his position with respect to not filing suit in the above matter was done, as was explicitly stated, without waiving any rights with respect to the pendency of the present Supreme Court proceedings.

Therefore, at the present time we will not agree to the taking of the stated depositions.

Very truly yours,

/s/ LOUIS WEINER
Louis Weiner
Regional Solicitor

SOL:SKE:sd